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Nos. 00-568, 00-800 and 00-809

In the Supreme Court of the United States

STATE OF NEW YORK, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

BOARD OF WATER, LIGHT AND SINKING FUND COMMISSIONERS OF THE CITY OF DALTON, GEORGIA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ENRON POWER MARKETING, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

In its Order No. 888 rulemaking, the Federal Energy Regulatory Commission found that public utilities subject to its jurisdiction under the Federal Power Act (FPA), 16 U.S.C. 792 *et seq.*, discriminated unlawfully in providing access to their electric transmission facilities. As a remedy, Order No. 888 requires them to unbundle their packaged wholesale electric energy service into separate energy sales and transmission services and to provide non-discriminatory access to their electric transmission systems in order to ensure "open access" to the interstate energy transmission grid and thereby facilitate competition in the national market for electric energy. The questions presented are:

1. Whether the Commission's open access regulations are permissible under Sections 205 and 206 of the FPA, 16 U.S.C. 824d and 824e.

2. Whether the Commission properly concluded that Section 201 of the FPA, 16 U.S.C. 824, authorizes the Commission to assert jurisdiction over interstate transmission service involved in a retail sale transaction where States have unbundled such transactions into separate transmission and sales services, but does not require the Commission to assert jurisdiction over transmission service that remains bundled with local retail sales and distribution service.

3. Whether Section 201 of the FPA authorizes the Commission to assert jurisdiction over facilities that may be used both for local distribution to retail customers and for transmission of electric energy to wholesale purchasers.

4. Whether Section 201 of the FPA bars the Commission from allowing utilities to recover certain stranded costs caused by the unbundling of retail electric service.

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In the Supreme Court of the United States

No. 00-568

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1-C121)[1] is reported at 225 F.3d 667. The relevant orders of the Federal Energy Regulatory Commission are reported as follows: Order No. 888, F.E.R.C. Stats. & Regs., Regulations Preambles January 1991-June 1996, ¶ 31,036; Order No. 888-A, 3 F.E.R.C. Stats. & Regs. ¶ 31,048; Order No. 888-B, 81 F.E.R.C. ¶ 61,248. Relevant portions of those orders are reprinted in Pet. App. D1-D125, E1-E120, and F1-F21; 00-809 Pet. App. 125a-369a, 371a-551a; 00-800 Pet. App. 1a-111a.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on June 30, 2000. A petition for rehearing was denied on August 22, 2000 (Pet. App. A1-A2). The petition for a writ of certiorari in No. 00-568 was filed on October 12, 2000. The petitions in Nos. 00-800 and 00-809 were filed on November 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Part II of the Federal Power Act (FPA or the Act), 16 U.S.C. 824-824m, confers on the Federal Energy Regulatory Commission (FERC or the Commission) jurisdiction over rates, terms, and conditions of electric transmission service provided by public utilities in interstate commerce.[2] Section 201(b)(1) of the FPA

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[1] Unless otherwise indicated, references to "Pet. App." are to the appendix to the certiorari petition in No. 00-568.

[2] Section 201(e), 16 U.S.C. 824(e), defines "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission." Section 201(f), 16 U.S.C. 824(f), excludes from FERC's jurisdiction companies owned by "the

authorizes the Commission to exercise jurisdiction over "the transmission of electric energy in interstate commerce," "the sale of electric energy at wholesale in interstate commerce," and "all facilities for such transmission or sale of electric energy." 16 U.S.C. 824(b)(1). Jurisdiction over "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce" is left to the States. *Ibid.* Section 201(c) further provides that electric energy is transmitted in interstate commerce if it is "transmitted from a State and consumed at any point outside thereof." 16 U.S.C. 824(c).

Pursuant to Section 205(c) of the FPA, 16 U.S.C. 824d(c), public utilities subject to FERC's jurisdiction must file tariff schedules with FERC showing their rates and service terms, along with related contracts for jurisdictional service. Section 205(b) of the Act prohibits such utilities from "grant[ing] any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage." 16 U.S.C. 824d(b). Whenever the Commission finds that any rate charged by any such utility "for any transmission or sale," or that any utility's practice "affect[ing] such rate" is "unjust, unreasonable, unduly discriminatory or preferential," Section 206 of the Act directs FERC to prescribe a lawful rate or practice for the future. 16 U.S.C. 824e.

2. In recent years, the electric utility industry has evolved from a traditional, heavily regulated industry dominated by vertically integrated monopolies into a more competitive industry in which customers have choices as to their power suppliers. Pet. App. C8-C10.

United States, a State or any political subdivision of a State," except as specifically provided.

A key impediment to developing a competitive wholesale market for electric power is the monopoly ownership of interstate transmission systems: a utility that controls access to transmission services can deny market access to competitors and favor its own generation in competing for buyers. *Id.* at C10. In Order No. 888, the Commission found, based on an extensive rulemaking record, that public utilities were denying or providing inferior access by others to their transmission service, in violation of the nondiscrimination provisions of Sections 205 and 206 of the Act. 00-809 Pet. App. 213a-218a.

As a remedy, Order No. 888 requires public utilities that own or control transmission facilities to offer transmission service to customers on terms comparable to the transmission service they use in serving their own power customers. Order No. 888 also prescribes certain minimum terms and conditions of service necessary to provide nondiscriminatory open-access service and requires utilities to file tariffs setting out those terms and conditions. Pet. App. C10-C11, D9. The Order further requires the unbundling of electric utilities' wholesale electricity product into separately priced sales and transmission services, and requires utilities to take transmission service for their own wholesale sales and purchases under the same open access tariff applicable to others. 00-809 Pet. App. 178a.

During the course of its rulemaking, the Commission addressed several issues concerning its jurisdiction over transmission of electric energy in light of the Act's provisions giving the States jurisdiction over local distribution and retail sales of electric energy. Among those issues was whether federal authority extended to the interstate transmission component of a public utility's sale of power to its retail customers. As the

Commission recognized, a growing number of States have permitted or required utilities that provide retail service to unbundle their services so that customers can purchase power from sources other than their historical suppliers. Pet. App. D7. Such unbundling, in turn, required the Commission to determine which transmission facilities and services would be subject to the nondiscriminatory tariffs of Order No. 888. The Commission resolved that jurisdictional question as follows:

> [W]e believe that when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail. Under the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales. However, when a retail transaction is broken into two products that are sold separately (perhaps by two different suppliers: an electric energy supplier and a transmission supplier), we believe the jurisdictional lines change. In this situation, the state clearly retains jurisdiction over the sale of the power. However, the unbundled transmission service involves *only* the provision of "transmission in interstate commerce" which, under the FPA, is exclusively within the jurisdiction of the Commission.

Id. at D44 (emphasis added). Given FERC's jurisdiction over unbundled transmission, the agency further distinguished between wholesale and retail transactions. In the wholesale situation, FERC asserted exclusive jurisdiction over the rates, terms, and conditions of all unbundled transmission service and the facilities used to provide the transmission, regardless of whether those facilities are labeled "transmission," "distribution" or "local distribution." *Id.* at D43-D44, D122, F8.

Order No. 888 thus requires public utilities offering such transmission to file transmission rate schedules with FERC that comply with its open-access rule, and provides that a share of the cost of transmission assets previously included in retail rate base will now be included in rate base subject to FERC's exclusive jurisdiction. *Id.* at D44-D53.

In the retail situation, however, FERC recognized both the States' continuing jurisdiction under Section 201 over "facilities used in local distribution," and the absence of any bright line to distinguish those facilities from interstate transmission facilities. The Commission therefore adopted a test to distinguish between transmission facilities and local distribution facilities, based on the function and technical characteristics of the facilities. Pet. App. D19-D20.[3] FERC also stated that it would defer to state recommendations in such matters, including where to draw the jurisdictional line between transmission and local distribution under FERC's test. *Id.* at D41-D52.

FERC further clarified several other aspects of its exercise of jurisdiction over unbundled transmission for

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[3] The test takes into account the following factors:

> (1) Local distribution facilities are normally in close proximity to retail customers; (2) Local distribution facilities are primarily radial in character; (3) Power flows into local distribution systems; it rarely, if ever, flows out; (4) When power enters a local distribution system, it is not reconsigned or transported on to some other market; (5) Power entering a local distribution system is consumed in a comparatively restricted geographical area; (6) Meters are based at the transmission/local distribution interface to measure flows into the local distribution system; (7) Local distribution systems will be of reduced voltage.

Pet. App. D19-D20.

retail sale. First, FERC emphasized that in exercising jurisdiction over the rates, terms, and conditions of the transmission component of unbundled retail transactions, it was not asserting authority either to order the unbundling of retail transactions or to order retail transmission to an ultimate consumer. Rather, its jurisdiction attaches only *if* retail transmission has been unbundled from the retail sale, either voluntarily by the utility or as a result of a state-ordered retail program. Pet. App. D44. Second, FERC clarified that its jurisdiction over the rates, terms, and conditions of unbundled retail transmission would not affect matters traditionally left to the States, "including authority to regulate the vast majority of generation asset costs, the siting of generation and transmission facilities, and decisions regarding retail service territories." *Id.* at D12; see also *id.* at D46 & n.544.

Order No. 888 also addresses problems created by "stranded costs," *i.e.*, a utility's sunk plant and other costs that it cannot recoup when customers, who previously took bundled service from the utility, take advantage of open-access transmission to purchase cheaper power from other suppliers. Pet. App. C11. Order No. 888 affords utilities an opportunity to recover such costs from a former customer that purchased its power requirements from the utility, but only if (a) the customer uses the former utility's transmission system to reach the new supplier, and (b) the utility shows a "reasonable expectation" that it would have continued to serve that customer beyond the end of its contract term. *Id.* at C11, C42-C48, D53-D54. With respect to costs stranded where retail customers are able to find new suppliers as a result of state retail unbundling, FERC recognized the primacy of state jurisdiction, and therefore took the position

that it would serve as a forum for cost recovery only if a state regulator lacked authority to do so and the departing customer uses a FERC transmission tariff to reach its new supplier. *Id.* at D80-D84, E91-E96.[4]

3. In a unanimous per curiam decision, the court of appeals upheld FERC's rules "in nearly all respects." Pet. App. C8.[5] The court first held that FERC had authority to require open access by virtue of its authority under Sections 205 and 206 to remedy undue discrimination by public utilities. *Id.* at C16-C19. The court of appeals relied in part on its decision in *Associated Gas Distributors* v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988), in which it upheld a similar open-access requirement imposed by FERC on natural gas transportation under parallel provisions of the Natural Gas Act (NGA). See Pet. App. C17-C19, C21-C22. The court further held that FERC permissibly relied on generic findings of undue discrimination by utilities, and that FERC therefore was not required to find each individual utility's rates or practices unlawful. *Id.* at C19-C22.

The court also affirmed the jurisdictional basis for Order No. 888. Pet. App. C26-C38. The court explained that "[b]oth FPA [Sections] 201(a) and (b) clearly and unambiguously confer upon FERC jurisdiction over the 'transmission of electric energy in interstate commerce.'" *Id.* at C30-C31. The court

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[4] FERC also stated that it would serve as the primary forum for recovery of stranded costs where former retail customers become wholesale customers through what is known as municipalization or municipal annexation. Pet. App. C79.

[5] The court remanded to the agency to explain its treatment of certain stranded energy costs and to provide a reasonable cap on certain contract extensions. Pet. App. C12.

observed (*id.* at C31-C32) that this Court held in *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972), that the very interconnection of utilities to the interstate grid results in a commingling of electricity and energy flows across state lines in interstate commerce, and under that precedent, "the FPA gives FERC the authority to regulate the transmissions at issue here, whether retail or wholesale." Pet. App. C33. The court also sustained FERC's decision not to assert jurisdiction over retail transmission that remains bundled with retail sales, reasoning that the Act is ambiguous with respect to the issue and that FERC's decision "represents a statutorily permissible policy choice to which [the court] must * * * defer under *Chevron*." *Id.* at C34. At the same time, the court rejected the challenge by certain States to FERC's exercise of jurisdiction over local distribution facilities that are used in wholesale transactions. The court concluded that since "FPA [Section] 201(a) makes clear that all aspects of wholesale sales are subject to federal regulation, regardless of the facilities used[,] FERC's assertion of jurisdiction over all wholesale transmissions, regardless of the nature of the facility, is clearly within the scope of its statutory authority." *Id.* at C37.

The court further held that FERC could permit recovery of retail stranded costs, in situations in which customers take advantage of state-ordered wheeling and state commissions lack the authority to award recovery of such costs. The court reasoned that "costs" are not jurisdictional and, thus, while Section 201(b) of the Act denies FERC jurisdiction over "facilities used for the generation of electric energy," 16 U.S.C. 824(b), "that provision does not necessarily prevent FERC from including *costs* relating to generating facilities in

transmission *rates*, over which FERC indisputably has jurisdiction." Pet. App. C81.

ARGUMENT

1. a. Petitioner Board of Water, Light and Sinking Fund Commissioners of the City of Dalton, Georgia (Dalton) argues (00-800 Pet. 7-10, 14-22) that FERC's reliance on generic findings of undue discrimination and its open-access remedy conflict with Section 206(a)'s requirement that FERC must premise a remedy on a finding that each individual utility's practice "affecting" a rate "is" unduly discriminatory.[6] That contention lacks merit.

FERC specifically concluded that "there is more than sufficient reason to believe that transmission monopolists *currently* engage in unduly discriminatory practices, and that they will continue to engage in unduly discriminatory practices, unless [FERC] fashion[s] a remedy to eliminate their ability and incentive to do so." 00-809 Pet. App. 216a (emphasis added). FERC based that finding on its own experience in reviewing applications and complaints, public comments presenting examples and allegations of widespread discrimination, and its determinations concerning the existence of systemic monopoly conditions and the economic self-interest of transmission monopolists–as well as FERC's expert prediction that such discrimination would likely

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[6] Dalton also suggests (00-800 Pet. 16-18) that its own circumstances justify the conclusion that FERC erred in making generic findings of discrimination and imposing a generic remedy. The court of appeals, however, found that contention not ripe for review, Pet. App. C24, and Dalton does not challenge that ruling in this Court.

increase in the future. Pet. App. C20-C21; 00-809 Pet. App. 209a-218a, 213a-214a, 315a-331a.[7]

The court of appeals therefore properly held that the agency's rules need not be premised on "specific findings" for each individual company where, as here, the agency's factual determinations are reasonable. Pet. App. C21. The court of appeals noted that it had previously upheld FERC's authority to proceed by rulemaking in exercising its parallel authority to address discriminatory practices under Section 5(a) of the NGA, 15 U.S.C. 717d(a), that Congress had ratified that approach in 42 U.S.C. 7173(c), and that the court had rejected similar challenges to FERC's ordering of open-access in the natural gas industry in *Associated Gas Distributors*, 824 F.2d at 1008. The court of appeals' decision upholding FERC's exercise of that settled authority in Order No. 888 presents no issue warranting this Court's review.

b. Dalton also contends (00-800 Pet. 22-27) that Order No. 888 conflicts with *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). In that case, this Court held that the FPA did not preempt an antitrust remedy that ordered involuntary wheeling (*i.e.*, mandatory transmission for a third party), reasoning that "[s]o far as wheeling is concerned, there is no authority

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[7] It is well-settled that an agency may rely on established economic principles in promulgating rules. See, *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 792-795 (1968) (upholding Commission's rejection of contract pricing based on considerations of, inter alia, "market imperfections" and a "monopsonistic environment"); see also Pet. App. C22. Dalton does not challenge either that proposition or the Commission's authority to proceed by rulemaking rather than case-by-case adjudication. See 42 U.S.C. 7173(c) ("[T]he establishment of rates and charges under [the FPA] * * * may be conducted by rulemaking procedures.").

granted the Commission under Part II of the Federal Power Act to order it, for the bills originally introduced contained common carrier provisions which were deleted." *Id.* at 375. As the court of appeals explained, however, *Otter Tail* does not address whether the Commission may order wheeling in the exercise of its authority under Sections 205 and 206 to remedy undue discrimination. Pet. App. C18-C19. Those provisions specifically confer on FERC the authority to prescribe rates and practices upon a finding of undue discrimination, and the court of appeals correctly held that FERC has reasonably construed those provisions as conferring broad authority to remedy unduly discriminatory behavior by an open-access requirement. *Id.* at C19. As the court of appeals also pointed out (C18-C19), that court rejected similar arguments based on *Otter Tail* in *Associated Gas Distributors* some 13 years ago. See 824 F.2d at 998-999. In this respect as well, then, the court of appeals' decision breaks no new ground and presents no issue warranting review by this Court.[8]

2. The petitioners in No. 00-568 are nine state regulatory commissions (the States) that challenge (Pet. 12-19) FERC's jurisdiction over the transmission service

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[8] There similarly is no merit to Dalton's claim (00-800 Pet. 26-27) that the Commission's open-access rule is inconsistent with the authority to order wheeling on a case-by-case basis under Section 211 of the FPA, 16 U.S.C. 824j. Nothing in Section 211 undermines the Commission's remedial authority under Section 206. See 16 U.S.C. 824k(e)(1) (Section 211 "shall not be construed as limiting or impairing any authority of the Commission under any other provision of law."); see also 00-800 Pet. App. 69a-70a. As the Commission explained, the authority conferred by Section 211 was simply inadequate to meet the industry-wide conditions it sought to address in Order No. 888. *Id.* at 45a-46a.

involved in unbundled retail transactions. The court of appeals properly rejected their contentions.

a. Section 201(b) explicitly gives FERC jurisdiction over all "transmission of electric energy in interstate commerce" and "all facilities for such transmission," regardless of whether the transmission is part of a wholesale or retail transaction. In *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 462-463 (1972), this Court recognized that when a utility's transmission lines connect to an interstate grid, the utility's energy commingles with that of other utilities so that inevitably some energy is transmitted across state lines and becomes interstate in nature.[9] The court of appeals therefore correctly concluded that "the FPA gives FERC the authority to regulate the transmissions at issue here, whether retail or wholesale." Pet. App. C33. The States' arguments to the contrary lack merit.

i. The States argue (00-568 Pet. 12) that the court of appeals improperly deferred to the Commission's view of its jurisdiction. The court held, however, that it was bound by this Court's interpretation in *Florida Power & Light* of "interstate transmission" under Section 201, and held only alternatively that it would defer to

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[9] For that reason, the States' reliance (00-568 Pet. 15-16) on Section 201(c), 16 U.S.C. 824(c), which states that energy is transmitted in interstate commerce if "transmitted from a State and consumed at any point outside thereof," is misplaced. With transmission interconnection, some of the electricity generated and transmitted in one State is almost inevitably consumed "outside thereof." That conclusion, however, does not create a null set of "intrastate transmission" under the FPA, because utilities may have no interconnection that would permit the physical transmission of power outside of a State, such as in Alaska, Hawaii, and most areas of Texas. See Pet. App. D43 n.541.

FERC's interpretation of its jurisdictional authority. See Pet. App. C33. In any event, this Court repeatedly has deferred to an agency's reasonable interpretation of a statute affecting the scope of its jurisdiction. See, *e.g.*, *Reiter* v. *Cooper*, 507 U.S. 258, 269 (1993); *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988); *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *CFTC* v. *Schor*, 478 U.S. 833, 845 (1986); see also *Mississippi Power & Light Co.* v. *Moore*, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring in the judgment) (collecting cases on question of deference to agency's interpretation of statute concerning its jurisdiction).

ii. The States argue (00-568 Pet. 14-15) that Order No. 888 conflicts with the statements by FERC and the Federal Power Commission (FPC) in congressional hearings and briefs to this Court that Section 201 does not extend the Commission's jurisdiction to retail sales. Neither FERC nor the FPC, however, has ever taken a position on the jurisdictional issues presented in this case. In Order No. 888, FERC addressed for the first time its view of the jurisdictional consequences of dramatic changes since enactment of the FPA, *i.e.*, the increase in competition in the electric utility industry and the advent of unbundled services. In light of those economic realities, FERC was well within its broad authority "to 'adapt [its] rules and policies to the demands of changing circumstances.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1313 (2000) (quoting *Motor Vehicle Mfrs. Ass'n of United States* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 (1983) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968))); see also *American Trucking Ass'ns* v. *Atchison, T.& S.F. Ry.*, 387 U.S. 397, 415 (1967) ("[T]he Commission, faced with new

developments, or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation.").

iii. The States further argue (00-568 Pet. 16) that Order No. 888 conflicts with Section 212(h) of the Act, 16 U.S.C. 824k(h), which sets forth the terms, conditions, and limitations on FERC's authority under Section 211, 16 U.S.C. 824j, to require transmission wheeling on a case-by-case basis, and provides that nothing in Section 212(h) "shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer." That provision has no application here, and in no way purports to limit FERC's jurisdiction under Section 201(b) over the rates, terms, and conditions of the transmission of electric energy in interstate commerce. Section 212(h) simply prohibits FERC from ordering transmission directly to an ultimate consumer, and in the challenged orders FERC disavowed any power to do so. Pet. App. D44. Moreover, when a utility engages in retail unbundling, either voluntarily or as required by state law, the States retain authority under Order No. 888 over local matters such as power production, customer service, and local reliability. *Id.* at D44-D46.

iv. The States assert (00-568 Pet. 17) that the Commission's exercise of jurisdiction over the transmission component on an unbundled retail transaction conflicts with this Court's observation in *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 215 (1964), that Section 201 creates a "bright-line" jurisdictional test between wholesale (*i.e.*, sales for resale) and retail (*i.e.*, direct) sales of energy. Order No. 888, however, does not depart from that test, but rather requires FERC to distinguish between facilities used for *transmission* and

facilities used for *local distribution.*[10] Indeed, the Court in *Southern California Edison*, 376 U.S. at 210 n.6, acknowledged the absence of such a bright-line distinction in that respect, concluding that the issue "involves a question of fact to be decided by [the agency] as an original matter." See also *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 531-536 (1945).[11]

v. The States argue (00-568 Pet. 18) that, as a policy matter, Order No. 888 undermines competition because it will encourage States not to order retail unbundling for fear of losing jurisdiction over transmissions associated with retail transactions. That contention erroneously assumes that States will not weigh their consumers' best interests in deciding for, or against, retail wheeling, but will be concerned only with protecting their own jurisdiction. In any event, the States have made no showing that Order No. 888 actually has deterred any State from ordering retail

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[10] Contrary to the States' suggestion (00-568 Pet. 17), the decision below does not conflict with *Northern States Power Co.* v. *FERC*, 176 F.3d 1090, 1096 (8th Cir. 1999), cert. denied, 120 S. Ct. 1221 (2000), which addressed aspects of Order No. 888's curtailment provisions. The decision in that case did not address FERC's jurisdiction over unbundled retail transmissions, facilities used in wholesale transactions, or stranded costs caused by FERC's open-access requirement.

[11] The States' reliance (00-568 Pet. 18) on *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 394 (1983), for the proposition that "mere interconnection of electric utilities is not enough to defeat state jurisdiction" is likewise misplaced. In that case, the Court had already determined that the FPA did not cover the transactions by rural power cooperatives that were at issue, before finding that regulation of wholesale rates was within the legitimate scope of local interests, notwithstanding a connection to the interstate grid. *Id.* at 384-385.

unbundling, and we have been advised by FERC that many States have ordered retail unbundling even after Order No. 888 became effective.

b. The States also challenge (00-568 Pet. 19-21) FERC's exercise of jurisdiction over local distribution facilities used in wholesale transmission transactions. The court of appeals properly rejected that argument, reasoning that Section 201(b) limits FERC jurisdiction over local distribution facilities "*except* as specifically provided in this subchapter and subchapter III," 16 U.S.C. 824(b)(1) (emphasis added), and Section 201(a) "makes clear that all aspects of wholesale sales are subject to federal regulation, regardless of the facilities used." Pet. App. C37. Consistent with Section 201(b)'s reservation of state jurisdiction over "facilities used in local distribution," Order No. 888 preserves the traditional areas of state regulation. Thus, where a public utility is transmitting unbundled energy to an end user —*i.e.*, where the transmission is connected to a retail rather than a wholesale transaction—Order No. 888 acknowledges that some of the facilities involved are local distribution facilities subject to state jurisdiction, and Order No. 888 establishes a test for defining the jurisdictional line on a case-by-case basis. *Id.* at D19-D20.

For similar reasons, the States err in arguing (00-568 Pet. 20) that Order No. 888 conflicts with this Court's observation in *Connecticut Light & Power Co.*, 324 U.S. at 531, that Congress's preservation of state jurisdiction in Section 201(b) over "facilities used in local distribution" is "a limitation on jurisdiction and a legal standard that must be given effect," regardless of whether the facility carries out-of-state energy. In Order No. 888, FERC has exercised jurisdiction over those facilities used in wholesale transactions, and it

has established a test to distinguish those facilities used for local distribution from those used for unbundled retail transmission. As the court of appeals concluded, Order No. 888 reasonably "recognizes the current reality that many primarily retail utilities engage in both local distribution and interstate transmissions, and seeks through the seven factors to discern each facility's primary function." Pet. App. C38.

There is likewise no merit to the States' contention (00-568 Pet. 19, 21) that the court of appeals' ruling upholding FERC's authority over all facilities used in wholesale transactions allows "FERC to usurp state power to ensure reliable local distribution," permits utilities to evade state regulation, and violates Congress's ban in Section 212(h), 16 U.S.C. 824k(h), on sham wholesale transactions. FERC stressed in its rulemaking that Order No. 888 would not affect traditional state jurisdiction over local service concerns, including reliability. Pet. App. D44-D53. Order No. 888 also does not affect the States' ability to set bundled retail rates, including a cost component reflecting use of facilities to deliver power to the ultimate consumer. FERC further stated that it would address on a case-by-case basis the possibility that transactions may be structured to avoid federal regulation, see, *e.g.*, *id.* at D52, and the States offer no reason to believe that FERC would approve a sham transaction barred by Section 212(h).

c. The States finally argue (00-568 Pet. 22-24) that FERC lacks the "backstop" authority to address requests for recovery of stranded costs arising out of state-ordered retail unbundling in the event that a state regulator lacks authority to provide for such recovery. The court of appeals correctly held, however, that the inclusion of stranded costs relating to genera-

tion facilities in transmission rates is a legitimate exercise of FERC's authority over transmission rates, because "[r]ates are jurisdictional; costs are not." Pet. App. C80-C81. For example, both FERC and a state commission may legitimately take the exact same plant costs into consideration in setting rates within their respective bailiwicks for setting wholesale and retail rates. *Id.* at C81. As the court explained, if a utility seeks to recover retail stranded costs in its FERC-jurisdictional transmission rates, FERC will exercise its traditional cost-of-service ratemaking jurisdiction to review those costs. *Ibid.* As the court further explained, both retail and wholesale stranded costs can be viewed as "costs" of providing transmission services because, while "such costs are not a cost of operating the physical transmission system, nevertheless, they are an economic cost incurred as a result of being required to provide retail transmission." *Id.* at C83 (quoting *id.* at E94 n.708). While agreeing that generation-related retail costs are not typically costs relating to transmission services, the court correctly held that "the fundamental changes wrought by state-ordered retail wheeling, as well as the narrow circumstances in which FERC will consider stranded-cost recovery claims, justify the conclusion that these costs are costs of providing transmission service." *Ibid.*[12]

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[12] The States similarly err in challenging (00-809 Pet. 24) FERC's exercise of jurisdiction over stranded costs in certain so-called "retail-turned-wholesale" situations where, for example, a municipal utility becomes the conduit by which a retail customer can switch from its historical local utility power supplier, using the local utility's FERC open access transmission tariff to reach a new supplier. Pet. App. D64-D65, E71-E78, F16-F19; 00-809 Pet. App. 499a n.479. In those situations, assuming the utility carries its burden of proof, FERC will provide for recovery through a customer-

FERC, moreover, has stated that "[t]he only circumstance" in which it would "entertain requests" to recover stranded costs relating to retail wheeling "is when the state regulatory authority does not have authority under state law to address stranded costs when the retail wheeling is required." Pet. App. C79. No such claim for recovery has been presented to the Commission in the almost five years since it issued Order No. 888, and the hypothetical circumstance of a state regulator not having authority to address the problem may never arise.

3. Petitioner Enron Power Marketing, Inc. argues (00-809 Pet. 11-16) that Section 201(b) requires the Commission to assert jurisdiction over transmission of electric energy that remains part of a bundled retail sale. The court of appeals, however, correctly declined to hold that the Commission must treat all bundled retail sales as separate sales and transmission services and assert jurisdiction over the transmission component of the transactions.

Although Section 201 clearly gives FERC jurisdiction over transmission in interstate commerce and wholesale sales, and the Act gives States jurisdiction over local distribution facilities and retail sales, the "statute is much less clear about exactly where the lines between those activities are to be drawn." Pet.

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specific surcharge to be added to the transmission rate. Pet. App. E85. The court of appeals correctly upheld FERC's authority in that respect, reasoning that "FERC's exclusive jurisdiction over all aspects of wholesale sales gives FERC all the authority it needs to include generation-related costs in rates, including even costs originally incurred to provide retail service." *Id.* at C91. Moreover, "[a]s in the retail wheeling context, these stranded costs are properly viewed as 'costs' of the former supplying utility's provision of open access transmission service." *Ibid.*

App. C34. The court of appeals therefore correctly held that "[a] regulator could reasonably construe transmissions bundled with generation and delivery services and sold to a consumer for a single charge as either transmission services in interstate commerce," over which FERC has jurisdiction, "or as an integral component of a retail sale," over which the States have jurisdiction. In those circumstances, the court properly deferred to FERC's decision to treat bundled transmission as part of retail sales as "a statutorily permissible policy choice." *Ibid.*[13]

Enron also contends (00-809 Pet. 17-22) that FERC's decision not to assert jurisdiction over bundled retail transmissions will have a detrimental impact on nondiscriminatory access to transmission services. FERC specifically considered the competing policy issues at stake, and permissibly determined that an exercise of its jurisdiction was not necessary to achieve nondiscriminatory open access to transmission services. In its

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[13] Enron argues (00-809 Pet. 14-15) that FERC's interpretation conflicts with this Court's interpretation in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972), of Section 1(b) of the NGA, 15 U.S.C. 717(b), a provision parallel to Section 201(b) of FPA. That case did not address, however, the Commission's authority to regulate transmission bundled with retail sales, but simply held that the reservation to the States of jurisdiction over retail natural gas sales did not preclude the Commission from exercising jurisdiction over the curtailment of natural gas deliveries in times of shortage. 406 U.S. at 623. Enron similarly errs in relying (00-809 Pet. 15-16.) on the D.C. Circuit's decision in *Mississippi River Transmission Corp.* v. *FERC*, 969 F.2d 1215 (1992), which held that FERC may regulate the transportation embedded in a retail natural gas sale. That decision construed FERC's authority to issue a certificate for pipeline service under Section 7(c) of the NGA, 15 U.S.C. 717f(c), a provision with no parallel in the FPA.

Notice of Proposed Rulemaking, the Commission explained that its approach "raises the possibility that the quality of transmission service for retail purposes will be superior to the quality of transmission service offered for wholesale purposes," 00-809 Pet. App. 634a, and therefore sought public comment on how its "bifurcated approach would affect the public utility's incentives to provide nondiscriminatory open access wholesale transmission service," *id.* at 635a.

In its Final Rule, the Commission explained that "[t]he majority of commenters addressing this issue believe that unbundling retail services is unnecessary to establish a competitive market and to achieve nondiscriminatory open access transmission." 00-809 Pet. App. 234a. After reviewing those comments, as well as views of commenters opposing the Commission's approach, the Commission concluded that "[a]lthough the unbundling of retail transmission and generation, as well as wholesale transmission and generation, would be helpful in achieving comparability," the Commission did "not believe it is necessary." *Id.* at 235a. That policy judgment is reasonable, and does not warrant this Court's review.[14]

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[14] In the event that the Court were to grant the States' petition challenging Order No. 888's exercise of jurisdiction, the Commission would not oppose the Court's granting of Enron's petition as well.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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